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No.

In the Supreme Court of the United States

October Term, 1984

PATRICK WELLS
Petitioner,
vs.
DAVID ROCKEFELLER ET AL.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Third Circuit

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QUESTION PRESENTED FOR REVIEW

There is not a Virgin Islands statute or provision of a restatement directly addressing the issue raised by Wells.

There is a split of authority on when the limitations period for civil conspiracy commences.

Some courts apply the rule used in criminal cases, that is, the limitations period begins on the commission of the last overt act of the conspiracy.

Other jurisdictions, including those of the third circuit have applied the rule that the period runs from each overt act causing damage.

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OPINIONS BELOW

The opinion of the District Court of the Virgin Islands, Division of St. Croix, Christiansted Jurisdiction. The opinion of the Court of Appeals for the Third Circuit.

JURISDICTION

The judgments of the Court of Appeals for the Third Circuit were made and entered on February 23, 1984 and copies thereof are appended to this petition in the Appendix. The jurisdiction of this court is invoked under 48 U.S,C.A. § 1391 and section 41 and 28 U.S.C.

The District Court of the Virgin Islands Division of St. Croix had jurisdiction over this matter under 28 US.C.A. §1332 and section 22 of the revised Organic Act of 1954 and 4 V.I.C. 32.

STATUTORY PROVISIONS

There is not a Virgin Islands statute or provision of a restatement directly addressing the issue raised by Wells.

STATEMENT OF THE CASE

Appellee, Fountain Valley Corporation, hereinafter referred to as "FVC", previously filed a complaint for possession of real property against the Appellant, Patrick Wells, hereinafter referred to as "Wells." Wells was served by publication. Pursuant thereto the lower court issued a summons giving Wells three (3) days in which to respond.

Thirteen days prior to the entry of the Default Judgment Wells filed a separate action against FVC; David and Laurance Rockefeller, hereinafter referred to as "the Rockefellers;" Estate Fountain River Company, hereinafter referred to as "the Partnership;" and Rockresorts, Inc. The Appelles voluntarily acknowledged service of process and thereafter filed a motion to dismiss under Rules 12(b) and 56, Fed. R. Civ. P. based upon Wells' failure to comply with Rule 13 (a) of the Federal Rules of Civil Procedure. On March 2, 1983 the lower court granted the Rule 12 (b) motion and dismissed Wells' complaint for failure to assert a compulsory counterclaim in the previous case. This appeal followed.

Simultaneously with this appeal and at the suggestion of the lower court in its Memorandum Opinion of March 2, 1983, Wells moved in the lower court to set aside the Default Judgment entered in the previous case. The lower court denied Wells' motion on July 22,

1983. Wells filed a Notice of Appeal to this Court on August 8, 1983. Wells will move to consolidate the two appeals subsequent to the filing of this brief.

On or about November 14, 1964, the Rockefellers, through the Partnership, acquired approximately four thousand and eighty-five (4,085) acres of land situated in Estate Fountain River, St. Croix, U.S. Virgin Islands. The aforementioned Appellees proposed to develop the acreage by constructing thereon residential estates, single family housing, condominiums, rental clusters, apartments, golf course and other recreational facilities, hotels and employee housing. Realizing that such a large scale development would require extensive landscaping, trees, shrubs and plants, the Rockefellers decided that the project should have its own nursery. Wells, a landscape designer and landscape contractor with a then thriving nursery business located in Fort Lauderdale, Florida where he also resided, was contacted and consulted regarding the feasibility of developing a nursery on the property to serve the needs of the proposed project. After Wells had attended numerous conferences, conducted research and inspected the development site and other places, the Rockefellers, jointly and individually, and/or for the Partnership, decided to make a proposal to Wells regarding the nursery project. Wells accepted the proposal on or about April, 1966. On or about April, 1967 the parties reached an agreement which was evidenced by a Memorandum signed by Wells and John W. McGrath, the project executive manager for the Rockefellers and the Partnership. On October 14, 1966 McGrath informed Wells by letter that he had "received general approval to set up a joint nursery operation and would like to discuss specifics." The parties agreed that the nursery would occupy a sixty-four (64) acre tract of land owned by the Partnership. The Partnership agreed to furnish the use of its land and fifty percent 50% of the cash needed. Wells agreed to furnish the other 50% of

the cash needed along with his expertise, supervision, and time. Profits were to be shared equally from net gains.

Pursuant to the aforementioned agreement and inreliance thereon, Wells continued working on the development of the nursery which he had started in April of 1966. Heavy duty equipment was brought in from Fort Lauderdale. Trailers were purchased to house employees. Trees and ornamentals unavailable in the West Indies were specially selected and transhipped to St. Croix. Thereafter, Wells scientifically managed, operated, cultivated, maintained and planted the sixty-four (64) acres of transplanted trees, plants and shrubbery. All of the planting was done with various transplants. Approximately fourteen thousand (14,000) trees were transplanted by Wells. Wells maintained and nurtured those trees for sixteen (16) years. The aforementioned trees and shrubbery are now valued at Five Million Dollars ($5,000,000.00).

At all times pertinent to this litigation Wells suffered from a chronic heart condition. He experienced two heart attacks, one in December, 1962, the other in June, 1968, and as a consequence thereof Wells has constantly been under the care of a physician at all times material to this litigation. The Appellees were advised through their agents, employees and/or officers of Wells' physical infirmity and his inability to tolerate stress or excitement. In the year of 1967 the Rockefellers, unbeknownst to Wells, decided to abandon their plan to develop the four thousand acre project and develop the four thousand acre project and supposedly therewith conveyed the land to FVC. The deed of conveyance was never recorded and has not been recorded to this date. The Rockefellers are the sole stockholders of FVC. Under the terms of the agreement between the Rockefellers and Wells, Wells was required to contribute the sum of Fifty Six Thousand Dollars, ($56,000.00), as his last nursery

contribution before being eligible to receive the last portion of the nursery contribution, payment of Twenty Eight Thousand Dollars, ($28,000.00) from the Rockefellers. After having borrowed money on short term loans for his contribution to the joint venture, Wells was not able to receive payment from the Rockefellers. Wells was informed by the officers of the Rockefellers that he would not be paid unless he signed a lease. For over seven months reimbursement was withheld by the Rockefellers and during the same seven month period Wells' physical condition deteriorated rapidly. The Rockefellers submitted a lease to Wells wherein it was recited that FVC was the owner of the land upon which the trees were planted. Feeling that his situation was very tenuous, four months and four lease and takeover drafts later, Wells capitulated and signed the lease.

Wells was advised by the officers of the Appellees that the lease was a real estate formality and would be changed later and would never be enforced and, in fact, it was not. Wells made payments for seven years out of nine years and was excused from payments for the full term of the lease by a written document. Wells was always advised by the agents of the Appellees that the special field grown trees would be used for any development of the four thousand acre tract of land. Notwithstanding the foregoing, upon the expiration of the lease Wells received a Notice to Quit from FVC and thereafter was served a Complaint for Possession by FVC pursuant to an Order for Substituted Service by Publication. wells was advised by the Summons issued therewith that he had only three (3) days in which to respond. Wells was advised in Fort Lauderdale, Florida. Wells immediately contacted his lawyer in St. Thomas by long distance. Wells informed his lawyer that a complaint seeking relief under 28 V.I.C. §782 and §785 had been filed against him and the summons indicated that he had only three (3) days in which to respond. Thereafter,

Wells' attorney reviewed the applicable code provisions and noticed that the three (3)-day response period corresponded with the provisions of 28 V.I.C. §785 which reads as follows:

> §785. Time for summons and answer; default judgment
>
> Upon the filing of the complaint, a summons shall be served and returned within 3 days, requiring the defendant to appear within 3 days after service thereof, and show cause why a judgment of dispossession should not be entered against him. In the event of the failure of the defendant to appear and show cause, judgment shall be rendered against him by default.

5 App. IV V.I.C. Rule 37, the procedural rule which governs the application of 28 V.I.C. §782 and §785, prohibits the parties in summary proceedings between landlord and tenant for the recovery of possession of premises under the provisions of 28 V. I.C. §781 *et seq.* from being joined with another cause of action, and further, states that the defendant shall not be permitted to file a counterclaim or third party complaint.

Knowing that Wells' tenancy under the lease had terminated and considering §782, §785, §793 and 5 App. IV, V.I.C., Rule 37, Wells' attorney concluded that Wells' interest in the joint venture would be best safeguarded by filing an independent action. Wells' attorney contemplated that Wells' interest lay primarily in the joint venture, rescission of the lease, charging an equitable lien or a constructive trust upon the land for the value of the trees and/or a claim for unjust enrichment. Further, it was apparent that Wells would need to join third parties in order to prosecute his claims.

Additional research revealed that in a case involving forcible entry or detainer the sole issue is possession and the proceeding is summary. Based upon the

foregoing, Wells was advised by his attorney that he could not file a counterclaim and should proceed by filing an independent action. Thereafter no answer was filed to FVC's Complaint for Possession.

On September 29, 1982, FVC obtained a Default Judgment pursuant to its Complaint for Recovery of Possession of Real Property.

On September 16, 1982, thirteen days prior to the date the default was entered, Wells' claim and lis pendens were filed against the Rockefellers, FVC, the Partnership and Rockresorts, Inc. for rescission, conspiracy, malicious interference with business relationships, wrongful eviction, equitable lien, fraud and deceit, and dissolution and winding up of joint venture. On or about November 23, 1982 Appellees filed their Motion to Dismiss the Complaint and for Summary Judgment pursuant to Rules 12 (b), 13 (a) and 56 of the Federal Rules of Federal Procedure. Briefs were submitted by the Appellees and the Appellant. The court entered judgment dismissing the complaint and releasing the lis pendens on March 2, 1983.

In support of its decision the lower court relied upon lack of a meritorious defense and culpability of Wells. Wells appealed the decision of the District Court to the United States Court of Appeals for the Third District.

On February 23, 1984, the Court of Appeals filed an opinion, in summary, we hold that the district court did not err in declining to open the default judgment in the eviction suit brought by Fountain Valley Corporation, and that judgment will be affirmed. We conclude also that summary judgment was properly entered against the plaintiff in the suit brought by Wells, with the exception of the count alleging misrepresentation and interference with his nursery business. The judgment on that count will be vacated and the matter remanded for further proceedings. In all other respects the summary judgment will be affirmed

SUBSTANTIALITY OF THE QUESTION PRESENTED

There is not a Virgin Islands statute or provision of restatement directly addressing the issue raised by Wells.

There is a split of authority on when the limitations period for a civil conspiracy commences.

Some courts apply the rule used in criminal cases, that is, the limitations period begins on the commission of the last overt act of conspiracy.

Other jurisdictions, including those of the third circuit have applied the rule that the period runs from each overt act causing damage.

The question presented by this case is of recurring significance to people who are unknowingly conspired by untruthful administrators of powerful individuals or corporate firms. When issues of unrealized importance have passed by, and as events finally unfold, the significance of these passed by issues are seen. The effect of the restrictive rule used by the Third Circuit Court limits the reliance of the victim on the law for fairness, that rule saying, the limitations period runs from each overt act of the conspiracy.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,
Patrick J. Wells, Appellant

APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT

(Opinion Filed February 23, 1984)

No. 83-3142

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PATRICK WELLS
Plaintiff - Appellant

v.

DAVID ROCKEFELLER, et al.
Appellee

No. 83-3403

FOUNTAIN VALLEY CORPORATION
Appellee

v.

PATRICK J. WELLS,
Appellant

In these consolidated Virgin Islands cases, we conclude that in a possessory action the district court properly refused to open a default judgment that the defendant permitted to occur as part of his litigation strategy. In another related cause, we measure the statute of limitations for a civil conspiracy from the overt acts causing damage, and commence the limitations period for an accounting and winding up from the date the joint venture ceased. On these bases, we affirm the judgment on one case, and in the other sustain a summary judgment in part but remand a remaining count not barred by the limitations period.

The Fountain Valley Corporation filed a complaint seeking possession of land it had leased to defendant Patrick Wells. He did not answer the complaint but brought a separate suit against Fountain Valley Corporation, David and Laurance Rockefeller, Rockresorts, Inc., and Estate Fountain River Company, alleging, inter alia, fraud in connection with a joint venture in the tract of land covered by the lease. On September 29, 1982, the district court entered a default judgment against Wells in the possessory action. The court later dismissed Wells' suit for failure to present his claims as a counterclaim to the eviction suit brought by Fountain Valley Corporation. Wells' motion to reopen the default judgment was denied.[1] He filed a separate appeal in each case, and, sua sponte, we consolidated them for disposition.

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1. The opinions of the district court are published at 97 F.R.D. 42 42 (dismissal) and 98 F.R.D. 679 (denial of motion to reopen).

In the early 1960's, David and Laurance Rockefeller formed a partnership, the Estate Fountain River Company, to purchase approximately 4,000 acres on St. Croix, Virgin Islands, The long-range plan for the land was the development of a large resort and residential community. Part of the project included the construction of the now famous Fountain Valley Golf Course. Wells, who was in the landscaping business in Florida, participated in the construction of the golf course.

The Wells Complaint alleges that in 1965 and 1966 he negotiated with Rockefeller officers about establish ing a nursery business on St. Croix to supply trees and plants for the proposed resort development and in 1966Wells began shipping trees to St. Croix and clearing land in the area planned for the nursery, a sixty-four acre tract that was part of the property owned by the Rockefeller partnership.

Wells asserts that in 1966 he and the Rockefellers entered into a joint venture agreement for ownership and the operation of the nursery at St. Croix. which was to be incorporated and its stock equally divided between Wells and Estate Fountain River Company.

Although Corporate Shareholders with management agreements and a dollar a year lease agreement were presented to Wells, none however, were ever finalized.

Wells was aware that Laurance Rockefeller had approved the St. Croix Nursery and Laurance Rockefeller had sent a request to Wells to consider another nursery to be located for him in Woodstock, Vermont.

In December 1967, Estate Fountain River Company conveyed a large parcel of land that included the nursery acreage to Fountain Valley Corporation, an entity controlled by the Rockefellers. The deed was not recorded and a Wells affidavit states that the conveyance occurred without his knowledge or consent. It was about this time, Wells contends, that the plans to develop the 4,000 acres were abandoned without any notice to him.

On June 10, 1968, Fountain Valley Corporation leased the sixty-four acres to Wells for a period of twelve years. Rental payments were based in part on a percentage of the gross receipts of the nursery. The business did not prosper, and Wells was given an indefinite extension on his rental payments. In September 1977, he executed a "Partial Surrender Of Lease" on six acres. In this document Wells relinquished a described portion of the premises in return for the release of all obligations for past and future rentals due under the original lease. The 1977 agreement gave the lessor all nursery stock standing on the surrendered 6 acre portion. It also stated expressly that, except as set forth, the partial surrender did not modify the terms of the original lease or extend its duration.

An affidavit by a Rockefeller aide states that on March 24, 1980, shortly before the twelve-year lease expired, Wells was granted a ninety-day extension to allow him to remove his trees and shrubbery from the remaining leasehold. In December 1981, Fountain Valley Corporation brought a Forcible Entry and Detainer action under Virgin Islands law, 28 V.I.C. §§782 and 785 (1976), to regain possession of the property.

Efforts to secure personal service on Wells were unsuccessful, he was back in Florida. Pursuant to a court order, notice of the suit was published four times during March 1982 in a local newspaper and a copy of the complaint was mailed to Wells' address in Florida. Wells was served again, by certified mail return receipt requested, on July 19, 1982. Wells concedes that he received a copy of summons and complaint at his Florida address. Approximately a month later, Fountain Valley filed a motion for default judgment. Wells received a copy of that motion by mail on August 24, 1982.

Following receipt of the complaint, and on the advice of counsel, Wells took no action on the eviction

case. Instead, on September 15, 1982, he filed a separate suit against Fountain Valley Corporation, David and Laurance Rockefeller, Estate Fountain River Company, and Rockresorts, Inc. On September 29, 1982, the court entered a default judgment in the eviction suit against Wells, granting possession of the premises to Fountain Valley Corporation. The Wells complaint was not brought to the attention of the district court before entry of the default judgment, nor did Wells move to consolidate his case with the eviction action.

In his separate suit, Wells asserted that he was "duped" into signing the lease in 1968 as part of a conspiracy to deprive him of his joint venture interest. There are also allegations that Fountain Valley Corporation interfered with the operation of the nursery by making false representations to Wells' customers. In his prayer for relief, Wells sought an accounting and winding up of the joint venture, a rescission of the 1968 lease, an order setting aside the 1967 conveyance to Fountain Valley Corporation, and punitive as well as compensatory damages.

The district court granted the Rockefeller interests' motion for summary judgment on the theory that the claims set out in the Wells complaint constituted matters that should have been pleaded as a compulsory counterclaim in the eviction suit. Since a default judgment had been entered there, the court viewed Wells' claims as extinguished under Fed. R. Civ. P. 13 (a). However, the dismissal order was expressly without prejudice to Wells filing a motion to reopen the default judgment in the eviction suit. 97 F.R.D. at 46.

Wells' motion to set aside the default and for leave to file an answer and counterclaim raised essentially the same points contained in his now dismissed separate complaint. The district court found that Wells' allegations did not constitute meritorious defenses to the eviction suit because they were barred by the

statute of limitations, and in some instances by the statute of frauds as well. 98 F.R.D. at 682-85.

Specifically, the court ruled that claims based on the joint venture dated back to 1968 because at that time Wells became aware that Fountain Valley Corporation was the owner of the land. Any joint venture with Estate Fountain River terminated at that point. Applying the two-year tort statute of limitations, 5 V.I.C. §31 (5) (A) (1967), the court concluded that the claims on the joint venture, for fraud, and for an accounting were time barred. The court also found that any action for conspiracy accrued no later than 1977 and thus was barred by the two-year limitations period.

Wells' asserted right to remove trees and shrubbery was held foreclosed by the terms of the 1968 lease as reaffirmed in the 1977 release and partial surrender of the 6 acres. 98 F.R.D. at 684. The court noted that Wells had been given an extension of time to remove his plantings.

The court also decided that Wells' culpability in not answering the complaint militated against lifting the default judgment. Id. at 687. The record revealed that Wells and his counsel decided to ignore the eviction action and assert his claims in a separate suit.

I

We will first consider the district court's refusal to open the default judgment. Wells contends that under Virgin Islands law, 28 V.I.C. §294 (a) (1976), a default judgment entered in a case where service is by publication must be opened when application is made within two years after entry. [2]

2. Section 294 provides in part: Vacation of judgment and new trial after service by publication.

(a) When service of the summons is made by publication and judgment is given for want of answer, upon application to the court at any time within two years from entry of the judgment, the defendant, successors in interest as to the whole or any part of the property, shall be entitled to an order vacating the judgment and granting a new trial upon the payment of the costs of the action.

In some respects this provision is similar to 28 U.S.C. §1655 (1976).

The short answer to this agrument is that section 294 does not apply to actions of the nature brought by the Fountain Valley Corporation. Forcible Entry and Detainer actions arise under Chapter 31, Subchapter II of Title 28 of the Virgin Islands CodeThe location of section 294 in Chapter 13 of Title 28, Actions to Recover Possession of Real Property, persuades us that section 294 only applies to actions brought under that chapter.

This conclusion is buttressed by the relief provision of 5 V.I.C. §112 (1976), the statute governing service by publication. Under section 112 (e), a default judgment entered after service by publication can be reopened within one year upon a showing of good cause.[3] The existence of that section, which is similar to section 294 but applicable in all service by publication cases, convinces us that section 294 does not apply in this instance.

Moreover, we find that Wells has not satisfied the good cause standard of section 112 (e). In the circumstances here, that standard is indistinguishable from the one applied by the district court and enunciated by us in Feliciano v. Reliant Tooling Co., 691 F.2d 653 (3d Cir. 1982), to determine whether a default judgment should be reopened under Fed. R. Civ. P. 60 (b). Because we affirm the district court's decision to deny reopening under Rule 60 (b), we conclude as well that the requirements of section 112 (e) have not been met.

Wells also argues that the court did not have jurisdiction because the summons was defective in reciting that a response to the complaint was due within three days, rather than the thirty days permitted by 5 V.I.C. §112 (c). This shortcoming, however was not even raised by Wells until brought to his attention by the district judge during one of the hearings. In the circumstances of this case, the error resulted in no prejudice and did not deprive the court of jurisdiction. See Newman v. Prior, 518 F.2d 97,99 (4th Cir. 1975); see also 4 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE §1088 (1969 & 1982 Supp.). There is no merit to this condition.

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3. Section 112 (e) provides in part:

"The defendant as to whom publication is ordered... may... upon good cause shown, and upon such terms as may be proper, be allowed to defend after judgment on such terms as may be just...."

Wells is on stronger ground in asserting that the district court erred in concluding that he had no meritorious defense to the eviction suit because the statute of limitations barred his invocation of affirmative defenses. A defendant's plea of recoupment, based on a matter arising out of the transaction sued on and used only to defeat a plaintiff's claim, is not generally barred by the statute of limitations. See Stone v. White, 301 U.S. 532 (1937); Heck v. Rodgers, 457 F.2 303, 307 (7th Cir. 1972) ("pure" defense not subject to statute of limitations) 3 J. Moore, MOORE'S FEDERAL PRACTICE ¶ 13.11 (1983). To the extent that the claims made by Wells in his answer were in the nature of recoupment or affirmative defenses, they were not barred by the statute of limitations as against plaintiff Fountain Valley Corporation

We need not explore this matter at any length, however, because the district court may be affirmed for another reason, namely, Wells' and his counsel's considered decision to allow the entry of the default judgment. As the district court found Wells followed this tactic as a matter of strategy; that being so, he must now live with its consequences. This case, therefore, is quite unlike those in which we have stated that default judgments should be set aside in doubtful situations. Gross v. Stereo Component Systems, Inc., 700 F.2d 120 (3d Cir. 1983); Feliciano v. Reliant Tooling Co., 691 F.2d 653 (3d Cir. 1982); Tozer v. Charles A. Krause Milling Co., 189 F.2d 242 (3d Cir. 1951). See also Burns v. MacMeekin (In re MacMeekin), 722 F. 2d 32 (3d Cir. 1983); Donnelly v. Johns-Manville Sales Corp., 677 F.2d 339 (3d Cir. 1982).

Wells argues that the default occurred because of his counsel's reasonable error in not anticipating the district court's holding that Wells' claims were compulsory counterclaims. However, the decision to gamble against that eventuality does not justify reopening the judgment in the circumstances of this case. Wells could have taken other, more prudent steps. He

might, for example, have filed the counterclaim in the eviction suit and awaited a decision by the district court on whether that procedure was proper. He could also have promptly filed his separate suit and moved to consolidate it with the eviction action before the default was taken . Cf. 6 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE §1418 at 105 (1971) (when action assertable as counterclaim is brought in same court as other claim, both actions can be consolidated).

In any event, Wells' explanation does not justify his failure to present any semblance of a defense against the suit brought by Fountain Valley Corporation. He clearly had the opportunity and the time to file an answer, as well as a counterclaim, as demonstrated by the independent action he filed two weeks before entry of the default judgment. Wells deliberately chose to ignore filing a response and invited a default judgment. The district court properly refused the motion to open the judgment in the circumstances.

II

The Rockefeller defendants attacked the separate Wells' suit on the ground that the complaint set out counts that should have been filed as compulsory counterclaims in the eviction case. The district court accepted that contention and granted summary judgment for the defendants.

There are some problems with the defendants' approach. Initially we observe that not all of the defendants in the Wells suit were parties to the Fountain Valley eviction action. Under Fed. R. Civ. P. 13, a counterclaim may be asserted only against an "opposing party." See generally 3 J. Moore, MOORE'S FEDERAL PRACTICE ¶ 13.06[1] (1983). It would seem, therefore, that Rule 13 would not necessarily

bar Wells' suit against those not named as plaintiffs in the eviction action. Compare American Triticale, Inc. v. Nytco Services, Inc., 664 F.2d 1136, 1148 (9th Cir. 1982); Reconstruction Finance Corp. v. First National Bank of Cody, 17 F.R.D. 397, 404-05 (D. Wy. 1955); with Banco Nacional de Cuba v. First National City Bank of New York, 478 F.2d 191, 193 & n.1 (2d Cir. 1973) (can assert counterclaim against alter ego); see also RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982) (issue preclusion in subsequent litigation with non-parties). As noted in MOORE'S a difference in emphasis exists in the interpretation of the term "opposing party": a liberal interpretation promotes the bringing of related claims but a narrow construction avoids the harsh penalty of barring subsequently asserted claims. ¶ 13.06 [1] at 13-31 to 13-32.

Moreover, the Virgin Islands legislature created the eviction action as a summary proceeding and arguably the applicability of Fed.R.Civ.P.13 should be read with the objective in mind. See Weems v. McCloud, 619 F.2d 1081, 1093-98 (5th Cir. 1980); 5V.I.C. App. IV R 37 (1982 Supp.); Cf.TPO, Inc. v. Federal Deposit Insurance Corp., 487 F.2d 131, 133 (3d Cir. 1973) (counterclaim not stricken though not permitted under state procedure). In addition there is force to the argument that in light of the restrictive nature of the action, the claims considered compulsory counterclaims should be limited to those directly affecting the plaintiff Fountain Valley Corporation's right to possession. Cf. RESTATEMENT OF JUDGMENTS §29 Comment c.

We prefer, however, to affirm part of the judgment on another ground. We conclude that, with one exception, the claims asserted in Wells complaint are time-barred.

Before us in the record on these consolidated appeals are affidavits addressing various issues in the

two cases. These affidavits include facts establishing that most of Wells' claims are beyond the statute of limitations. Although expiration of the limitations period may not be used to deny the assertion of an affirmative defense, a claim for affirmative relief that relies on the same factual basis nevertheless comes within the limitations ban.

The statute of limitations question was addressed by parties in connection with the motion to open the default judgment in the eviction case, and the court denied relief on that basis. Because Wells actively disputed the limitations question in that proceeding, we need not remand for the determination of this issue in the action brought by Wells. See Rich v. United States Lines, Inc., 596 F.2d 541, 551 (3d Cir. 1979). The material facts on this point are before us on the consolidated record. Cf. Prewitt v. United States Postal Service, 662 F.2d 292, 305 (5th Cir. 1981); Mueller v. Turcott, 501 F.2d 1016 (7th Cir. 1974). We have the parties and the district court's views on the mater; we will therefore determine whether the grant of the summary judgment can be sustained on the basis of the statute of limitations. Smith v. Virgin Islands, 329 F.2d 135, 142 (3d Cir.), cert. denied, 377 U.S. 979 (1964). See 10 C. Wright & A. Miller & M. Kane, FEDERAL PRACTICE AND PROCEDURE §2716 at 657-662.

The district court concluded that all of Wells' claims sounded in tort and were governed by the two-year limitations period of 5 V.I.C. §31 (5) (A). No challenge has been raised to that ruling on this appeal. Accordingly, we will proceed on that basis as well.

Wells' contention is that the district court was incorrect in its assessment of when his causes of action accrued. The complaint alleges that the Rockefellers, in derogation of the joint venture and without Wells' knowledge or consent, conveyed the nursery tract to Fountain Valley Corporation in 1967. The following

year, he was allegedly misled into signing the lease for the sixty-four acre parcel. Wells' theory is that these events, culminating in the commencement of the eviction action, formed part of a broad conspiracy to deprive him of the joint venture assets.

Because of the long standing conspiracy and the defendants' assurances that the lease was a mere formality, Wells contends that the statute of limitations did not begin to run until the eviction action was brought in 1982. As an alternative argument, he asserts thatthe limitations period should be tolled because he was not aware of any misconduct in connection with the joint venture and the lease until 1981. He also argues that the joint venture has not yet ended and, therefore, he is entitled to a winding up at this time.

One of the Wells' affidavits belies the assertion that he was unaware of any misconduct until 1981. In that document he acknowledges that in March 1968 Rockefeller aides told him that the sixty-four acre tract was owned by Fountain Valley Corporation. Indeed, the lease executed at that time describes the corporation as the owner. The affidavit states that the fact of Fountain Valley Corporation ownership "convinced me that my joint venture agreement with the Rockefellers would be valueless since I was thus led to believe that neither the Rockefellers nor Estate Fountain River Company had any interest in the land."

The affidavit further asserts that in 1981 Wells learned that an unrecorded conveyance to Fountain Valley Corporation took place in December 1967, "at a time when I had been led to believe that the land was owned by Rockefellers and at a time when ... the.. property ... was being used for our joint business operation..." The timing of the unrecorded conveyance "indicated" to Wells in 1981 "that the Deed [had been] executed for the sole purpose of defrauding me into signing the Lease by intimidating me into believ-

ing that my Joint business agreement with the Rockefellers was of no effect in that it involved land that someone else owned."

The Wells' tolling argument places significance on his lack of knowledge of the conveyance until 1981. However, his own affidavit makes clear that as of March 1968 he was aware of conflicting assertions of ownership to the property and believed that his joint business arrangement with the Rockefellers and Estate Fountain River Company was in jeopardy. Any claims Wells had in connection with that venture or the consumation of the lease accrued during that period. In these circumstances there can be no tolling on the basis of undiscovered fraud because Wells concedes his knowlerdge of the significance of the events.

Moreover, the terms of the original lease are consistent with the termination of Wells' earlier association with the Rockefellers, and the formation of a new arrangement with the Fountain Valley Corporation. This was more than the usual landlord-tenant relationship -- the lease acknowledged a $78,000 loan to Wells; for the purchase of the Rockefeller Brothers 50% share of ownership of the nursery trees. Rent payments were to be a percentage of gross reciepts less loan pur chase payments; and both parties were restricted by a non-competition clouses.

Wells argues that even if the joint venture was dissolved on the signing of the lease in 1968, he still has a right to a winding up and distribution of the assets. In addressing this argument, the district court used, by analogy, the provision of the Uniform Partnership Act, 26 V.I.C. §135 (1970), that states "[t]he right to an account... as against winding up partners" accrues on the date of dissolution. The court concluded, therefore, that the cause of action accrued in 1968. Wells contends that the joint venture, as well as the right to an accounting, continues until the formal winding up of the joint venture's affairs is completed.

Under some circumstances, courts have been gen-

erous in overlooking delays in seeking an accounting, but no justification for that approach exists here. Wells' own affidavit states that in 1968 he was "convinced... that [the] joint-venture agreement... [was] valueless" because his coventurers did not own the nursery acreage. His new relationship with Fountain Valley Corporation began at that time, continued for more than 12 years, and included renegotiation of the lease terms. No facts have been presented by Wells that would require the court to excuse his lack of diligence in pursuing an accounting in a timely fashion. We conclude that Wells' demand for an accounting and winding up are time barred.Cf. Schlossberg v. Corrington 80 I11. App. 3d 860, 400 N.E. 2d 73, (1980); Turner v. Turner, 305 A.2d 592 (Vt. 1973).

On another tack, Wells contends that the events of 1967 and 1968 are part of a broad conspiracy whose statute of limitations did not begin to run until the commission of the last overt act. Pressing this view, he argues the bringing of the eviction suit in 1982 was the act that began the running of the limitations period and thus his complaint is timely. No Virgin Islands statute or provision of a RESTATEMENT directly addresses the issue raised by Wells. Thus, in determining the controlling rule of decision for the Virgin Islands, we look to other sources of the common law. See 1 V.I.C. §4 (1967).

There is a split of authority on when the limitations period for a civil conspiracy commences. See Auld v. Mobay Chemical Co., 300 F.Supp. 138, 142 (W.D. Pa. 1969). Some courts apply the rule used in criminal cases, that is, the limitations period begins on the commission of the last overt act of the conspiracy. See e.g., White v. Bloom, 621 F.2d 276, 281 (8th Cir.), cert. denied, 449 U.S. 995 (1980), 449 U.S. 1089 (1981). See also Grunewald v. United States, 353 U.S. 391, 396-97 (1957) (criminal conspiracy).

Other jurisdictions, including those of this circuit, have applied the rule that the period runs from each

overt act causing damage. See Ammlung v. City of Chester, 494 F.2d 811, 814-15 (3d Cir. 1974) (Pennsylvania law); Williamson v. Columbia Gas and Electric Corp., 186 F.2d 464, 469 (3d Cir. 1950), cert. denied, 341 U.S. 921 (1951); Phoenix Canada Oil Co. v. Texaco, Inc., 560 F. Supp. 1372, 1388-89 (D. Del. 1983) (Delaware law); Safeguard Mutual Insurance Co. v. Miller, 477 F. Supp. 299, 308 (E.D. Pa. 1979); Park-In Theatres, Inc. v. Paramount-Richards Theatres, Inc., 90 F. Supp. 727, 729 (D. Del.) (Delaware law), aff'd 185 f.2d 407 (3d Cir. 1950), cert. denied, 341 U.S. 950 (1951); Auld v. Mobay Chemical Co., 300 F. Supp. 138 142 (W.D. Pa 1969); Dovberg v. Dow Chemical Co., 195 F. Supp. 337, 342-43 (E.D. Pa. 1961). See also Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338-42 (1972). But see Farbenfabriken Bayer, A.G. v. Sterling Drug Inc., 153 F. Supp. 589 (D.N.J. 1957) (last overt act causing damage).

The rule generally adopted by the case law in this circuit provides greater certainty as to when a particular cause of action arises. For each act causing injury a claimant must seek redress within the prescribed limitations period. Such a rule is consistent with the distinction between civil and criminal conspiracies. In the civil case, actual injury is the focal point, not the illegal agreement per se, as is true in the criminal context. See W. Prosser, LAW OF TORTS 292 (4th ed. 1971).

Adoption of the last overt act rule urged by Wells would invite attempts to revive time-barred injuries by piggy-backing them onto action occurring within the relevant period. No unfairness results in requiring diligence in seeking a remedy within the period measured from the date an injury occurs. We conclude that Wells' conspiracy allegation would not preserve claims that the district court ruled were otherwise barred by the two-year statute of limitations.

III

It is not clear that all of Wells' claims predate his complaint by two years. In addition to the allegations made in connection with the joint venture and the conspiracy, the Wells' complaint, in a possibly unrelated count, alleges wrongful interference with his business. His affidavit suggests that misrepresentations and acts of conversion were committed by Fountain Valley Corporation against the nursery operation. The time of these acts is not clearly stated, but some events may have occurred as late as 1982.

Because of the lack of specificity in both the complaint and the affidavits on this latter issue, it is not possible to establish when all the alleged wrongful acts occurred. Some of the misrepresentations and interference may have occurred in the two-year period before filing the complaint. On the record before us, the statute of limitations issue on these allegations is not ripe for summary judgment.

We also note in passing that there may be no nexus between this claim and Fountain Valley Corporation's right to possession of the sixty-four acre parcel. Hence, it is possible that this particular count may not fall in the category of a compulsory counterclaim. Because the facts forming the basis for this count are not developed, we are not in a position to determine whether it is still viable. We therefore conclude that the claims of interference, conversion, and misrepresentation set out in paragraphs 32 and 33 of the Wells' complaint should not have been included in the summary judgment. The matter should be addressed by the district court in the first instance after amplification of the record.

In summary, we hold that the district court did not err in declining to open the default judgment in the eviction suit brought by Fountain Valley Corporation and that judgment will be affirmed. We conclude also that summary judgment was properly entered against the plaintiff in the suit brought by Wells, with the exception of the count alleging misrepresentation

and interference with his nursery business. The judgment on that count will be vacated and the matter remanded for further proceedings. In all other respects, the summary judgment will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed March 2, 1983)

Case No. 82-212

IN THE UNITED STATES DISTRICT COURT
OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

PATRICK WELLS

Plaintinff

v .

DAVID ROCKEFELLER et al.,

Defendant

MEMORANDUM OPINION

The defendants in this action moved to dismiss the plaintiff's complaint, asserting that Fed. R.Civ.P. 13(a) required the plaintiff to file the pleading herein as a compulsory counterclaim to an earlier action filed by one of the defendants. The Court finds that Rule 13 (a) does in fact apply, for the reasons stated herein the defendants' motion will be granted without prejudice to an appropriate application for relief from a default judgment in the earlier case between the plaintiff and one of the defendants.

I. FACTS

The genesis of this dispute dates back to the 1960's, whn the brothers Rockefeller undertook the Fountain Valley project on St. Croix which is now the internationally renowned Fountain Valley Golf Course. It was originally anticipated that the golf course would be the centerpiece for an even larger project, including homes and a resort hotel on the 4,000 acres purchased

by David and Laurance Rockefeller. The Plaintiff, Patrick Wells, ("Wells"), was in the landscaping business in Florida, and was in part responsible for the landscaping at Fountain Valley.

On June 10, 1968, Defendant Fountain Valley Corporation ("FVC") and Wells entered into a lease for a 64-acre portion of the 4,000 acres, on which Wells had already located a joint venture nursery for the total project. In the action herein, Wells claims that defendants had agreed to a joint venture for development of the entire 4,000 acres, and that he was "duped" and "coerced" into the lease.

He seeks damages for rescission of the lease, conspiracy, malicious interference with business relationships, an equitable lien, and an accounting upon dissolution of a joint venture. There are also allegations of fraud and deceit; all apparently antedating the lease, although there is a claim of an ongoing conspiracy dating from 1971.

The complaint was filed in September, 1982.

Earlier, in a separate action, (Civ. No. 81/310), FVC had filed a complaint against Wells for possession of real property unlawfully detained, citing 28 V.I.C. §§ 782 and 785. The lease had expired, and FVC sought possession of the property. Apparently, although service by publication was made as of March 27, 1982, Wells was not given service by certified mail, return receipt requested, until July 19, 1982.

A default was sought on August 23, 1982, notice of which was also sent to Wells, and, finally, an order was entered on September 29, 1982 granting restitution of the 64-acre parcel to FVC, Wells never having appeared in the action in any manner, shape or form. His response to that action was the filing of this separate suit before entry of the default judgment granting restitution of the premises.

II. DISCUSSION

A. Does Rule 13 (a) Apply?

[1] The defendants argue in this motion that Wells should have filed a counterclaim in the earlier action, and because he did not, he is barred from maintaining this action. Wells states that he did not think he had a legal right to file a counterclaim in an action for forcible entry and detainer under Virgin Islands law, and thus he filed separately.

This Court need not spend a great deal of time discussing whether the allegations contained in the instant complaint by Wells fall within the parameters of Rule 13 (a) Fed.R.Civ.P. Obviously they do, and the attempt by Wells to argue otherwise is but elegant sophistry. The 46 paragraphs of Wells' complaint repeat, over and over, variations on a central theme he was bilked in an occurrence and transaction involving the 64 acres which formed the lease between himself and FVC, His prayer for relief seeks rescission of that lease, an equitable lien and constructive trust over the same 64-acre parcel, damages for wrongful eviction, and restitution of the property to himself. He even describes his own version of how and why the lease came about.

In short, Wells' complaint in the instant action (1) arises out of the transaction or occurrence which was the subject matter of the earlier action by FVC; (2) it is against "opposing" parties in the prior action; (3) he had these claims at the time the prior action was commenced and (4) the assertion of these claims in the prior action would not have required the presence of third parties over which this Court could not acquire jurisdiction.

[2] As such, it should have been asserted in the original action brought by FVC concerning the lease. Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 634, (3rd Cir. 1961); Xerox Corp. v.

SCM Corp., 576 F.2d 1057, 1059 (3d Cir. 1978). Where an action is brought on a lease, a torto claim arising out of the circumstances by which such lease came into being is a compulsory counterclaim. National Equipment Rental, Ltd. v. Fowler, 287 F.2d 43, 45 (2d Cir. 1961); Rosamund Harper v. Govt. of the Virgin Islands et al., 1982 St. C. Supp. ----(O'Brien, J., Dec. 7, 1982).

B. Must the Complaint Be Dismissed?

[3] As indicated earlier, the defendants maintain that since Rule 13 (a) applies, and was not complied with, the instant complaint must be dismissed. The plaintiff argues that he could not acquire jurisdiction over all necessary parties, a claim that is frivolous in light of the fact that all necessary parties are before the Court in the instant action brought by Wells. What he did in this case, he could have accomplished earlier as well. He also suggests that because the original action resulted in a default judgment, Rule 13 (a) should not apply. This is likewise frivolous.

But plaintiff makes one argument which requires discussion. He states that proceedings for forcible entry and detainer under 28 V.I.C. §782 are summary in nature, and under Section 785 of that statute, the summons is returnable within three days of service. Under the practice in the Territorial Court of the Virgin Islands, he correctly notes, no counterclaims are allowed; the case is tried on the plaintiff's complaint and any affirmative defenses which could be raised by a defendant.

Ordinarily, the Court would give short shrift to such an argument, since the rule applies only to cases brought in the Territorial Court. Indeed, actions in the District Court are governed by the Federal Rules of Civil Procedure, under Section 25 of the Revised

Organic Act of 1954 (48 U.S.C. §1615). Thus, Rule 13 (a) would apply, and under ordinary circumstances, the failure to assert the compulsory counterclaim earlier should result in dismissal of this later action. Every attorney practicing in this jurisdiction knows, or should know, about the applicability of the federal rules to District Court.

But matters do no end there.

This Court is reluctant to grant the defendants' motion because FVC itself did not comply with the same Federal Rules of Civil Procedure, when it brought the earlier action. That failure to comply with the rules was of such a misleading nature, it could be argued,that to grant defendants relief at this juncture would be unjust and unfair.

The lack of compliance by FVC occurred when FVC was unable to locate Wells in the Virgin Islands for purposes of personal service. FVC then acted pursuant to Fed. R. Civ. P. 4 (d) (7) and sought an order for service by publication and certified mail, under the provisions of 5 V.I.C. §112. This section of the Virgin Islands Code permits service by publication and certified mail under specific conditions. This Court granted the order on February 15, 1982 and FVC proceeded to publish its summons against Wells in the St. Croix Avis once a week for four consecutive weeks. FVC also mailed a copy of the summons and complaint to Wells at his Florida address, and received a return receipt.

But what FVC did not do was comply with the strict provisions of 5 V.I.C. §112 (b) which states:

> (b) The summons published shall contain the name of the court and the title of the cause, a succinct statement of the relief demanded, the date of the order for service by publication, and the time within which the defendant is required to answer the complaint.

The actual notice of publication as published by FVC in the St. Croix Avis is as follows:

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

FOUNTAIN VALLEY CORPORATION Plaintiff	CIVIL NO. 1981/310
vs.	
PATRICK J. WELLS, Defendant	ACTION FOR POSSESSION OF REAL PROPERTY UNLAWFULLY DETAINED

NOTICE

TO: PATRICK J. WELLS
P. O. BOX 9644
Ft. Lauderdale, FL 33310

WITHIN THE TIME limited by law (not later than three (3) days after the last publication) you are hereby required to appear before this Court and answer a Complaint filed against you in this action, and in case of your failure to appear or answer, judgment by default will be taken against you as demanded in the Complaint for Possession of Real Property Unlawfully Detained.

WITNESS MY HAND AND SEAL of this Court this 16th day

February, 1982.

NICHOLAS & NEWMAN
Attorneys for Plaintiff
7 King Street
Christiansted, St. Croix
U.S. Virgin Islands 00820
Tel: (809) 773-3200

FRANK BLACKMAN
Clerk of the Court

3/6, 13,20&27

It will be noted that the summons published by order of the Court does not (1) state the date of the Court's order permitting publication nor (2) give the correct time when the summons is returnable, pursuant to 5 V.I.C. 112 (b). The summons requires a return within three days. The law, 5 V.I.C. §112(c). requires a return within thirty days. thus, the actions of FVC were misleading, and may well have led to the conclusion on the part of Wells and his attorneys that a response to that action would be futile, and a separate action would be necessary.
Additionally, the summons sent to Wells also recites a required return of three, instead of thirty days.

This is... how can I characterize it?... a delicious irony. The defendants unctuously attack the plaintiff in memoranda and oral argument for failure to comply with the Federal Rules of Civil Procedure, specifically

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1. The defendants did not include this item among their numerous exhibits, nor did they include as an exhibit the summons actually mailed to Wells. The Court takes judicial notice of both the published summons and that mailed to Wells, as part of the Official file in Fountain Valley Corporation v. Patrick J. Wells. Civ. No. 81/310 (D.V.I., St. Croix). they will be considered part of the record in the proceeding herein.

Rule 13 (a). Then, on closer examination of documents defendants had not filed with their motion the Court discovers that these same defendants had failed to comply with the same Federal Rules whose application they so fervently sought to enforce against the plaintiff. Some might call it "chutzpah." What does one do with such a situation?

The case is in a unique posture in any event. Wells has not moved to reopen the default judgment to permit him to file a compulsory counterclaim under Rule 13 (a). Rather than seek to reopen the original action, he asks that he be allowed to proceed with this case.

Fed.R.Civ.P. 13 (f) speaks of permission, with leave of Court, to assert a counterclaim "when justice requires." It does not speak of permission to continue a second action which should have been asserted as a counterclaim in an original action. The Court has found no direct precedent which is helpful. But the language of Rule 13 (f) clearly speaks in terms of permitting a party to ammend its pleadings or file a responsive pleading in the original action, and not to permit the separate action filed later to proceed.

I have before me only the motion to dismiss the second lawsuit brought by Wells. Notwithstanding the defendants' own failure to comply with the Federal Rules of Civil Procedure, they are entitled to that dismissal because the assertions in Wells' complaint should have been made part of a compulsory counterclaim to the first action. The only remedy at this state for Wells is for him to do what he should have done in the first place: move appropriately for relief from the default judgment originally entered. Such a motion would then be decided on the basis of the criteria applicable to such motions, and the defendants who are not part of the original action could be joined, if the Court grants relief.

Such a motion would give these defendants the

right to raise all of the issues inherent in a motion to reopen a default judgment.

CONCLUSION

The motion of the defendants for dismissal of plaintiff's complaint will be granted without prejudice to a motion by plaintiff to reopen the default judgment in Civ. No. 81/310.

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

PATRICK J. WELLS, Plaintiff	)	CIVIL NO. 82-212
vs.	)	
FOUNTAIN VALLEY CORPORATION Defendant.	)	

ORDER

THIS MATTER is before the Court on Defendant's Motion to Set Aside a Default Judgment, Motion for Leave to File an Answer and Counterclaim and a Motion for Joinder of Additional Parties. The premises considered, the memorandum attached, it is hereby

ORDERED:

THAT the motions are DENIED.
DATED this 22 day of July, 1983.
ENTER:

DAVID V. O'BRIEN, Judge

ATTEST:

GEOFFREY BARNARD
Clerk of the Court

By_____
Deputy Clerk

For the Third Circuit

No.s 83-3142 & 83-3403

No. 83-3142

PATRICK WELLS,
Appellant

vs.

DAVID ROCKEFELLER, LAURANCE ROCKEFELLER
ROCKRESORTS, INC., FOUNTAIN VALLEY
RIVER COMPANY, INC.

No. 83-3403

FOUNTAIN VALLEY CORPORATION

vs.

PATRICK J. WELLS,
Appellant

(D.C. Civil Nos. 82-212 & 81-3)
ON APPEAL FROM THE DISTRICT COUI OF THE
VIRGIN ISLANDS DIVISION OF ST. CROIX,
CHRISTIANSTED JURISDICTION

Present: HUNTER, WEIS and ROSENN, Circuit Judes

JUDGMENT

These causes came to be heard on the record from the District Court of the Virgin Islands, Division of St. Croix, Christiansted Jurisdiction and were argued by counsel December 6, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered July 22, 1983 (No. 83-3403) be, and the same is hereby affirmed. It is further ordered and adjudged by this Court that the judgment

of the said District Count entered March 2, 1983 (No. 83-3142), be, and the same is hereby vacated with respect to the court alleging misrepresentation and interference with the nursery business, affirmed in all other respects, and the cause remanded for further proceedings. Costs taxed against appellant in each case.

ATTEST:

Clerk

February 23, 1984

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS DIVISION OF ST. CROIX

PATRICK WELLS,
Plaintiff

vs.

DAVID ROCKEFELLER, LAURENCE ROCKEFELLER ROCKRESORTS, INC. a corporation FOUNTAIN VALLEY CORPORATION, a corporation and ESTATE FOUNTAIN RIVER COMPANY, a partnership,

Defendants.

CIVIL NO. 82-212

ACTION FOR RESCISSION, CONSPIRACY, MALICIOUS INTERFERENCE WITH BUSINESS RELATIONSHIPS, EQUITABLE LIEN, FRAUD AND DECEIT, DISSOLUTION OF JOINT VENTURE.

JUDGMENT

THIS MATTER is before the Court on motion of the defendants for dismissal of the complaint. The

Court having filed its Memorandum Opinion of even date herewith, and the premises considered, now therefore it is

ORDERED, ADJUDGED AND DECREED:

1. THAT the plaintiff's complaint be and the same is hereby DISMISSED.

2. THAT the lis pendens filed by the plaintiff in the above captioned matter by and the same is hereby RELEASED. DATED this 2nd day of March, 1983.

ENTER:

DAVID V. O'BRIEN, Judge

ATTEST:
GEOFFREY BARNARD
Clerck of the Court

By _____
Deputy Clerk

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

May 24, 1984

Patrick J. Wells
2560 N.W. 18th Terrace
Fort Lauderdale, Florida 33310

RE: Patrick Wells v. David Rockefeller et al. and
Patrick J. Wells v. Fountain Valley Corporation
No. A-955

Dear Mr. Wells:

Your application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Brennan, who on May 24, 1984, signed an order extending your time to and including July 22, 1984.

A copy of the Justice's order is enclosed.

Very truly yours,
ALEXANDER L. STEVAS, Clerk

By

Katherine Downs
Assistant Clerk

gtb
Enc.
cc (letter only): Todd H. Newman, Esq.
Robert C. Myers, Esq.

Clerk, U.S. Court of Appeals
for the Third Circuit
(your No. 82-3142)

SUPREME COURT OF THE UNITED STATES

No. A-955

PATRICK WELLS,
Petitioner,
v.
DAVID ROCKEFELLER, ET AL. and

PATRICK WELLS,
Petitioner,
v.
FOUNTAIN VALLEY CORPORATION

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of petitioner(s), IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

July 22 , 1984.

Dated this 24th day of May , 1984.

/s/ William J. Brennan
Associate Justice of the Supreme Court of the United States

Office - Supreme Court, U.S.
FILED
APR 11 1985
ALEXANDER L. STEVAS
CLERK

84-1190

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

PATRICK J. WELLS,

Petitioner,

—against—

DAVID ROCKEFELLER, LAURANCE ROCKEFELLER, ROCK-RESORTS, INC., FOUNTAIN VALLEY CORPORATION and ESTATE FOUNTAIN RIVER COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

ROBERT C. MYERS
Counsel for Respondents
140 Broadway
New York, New York 10005
(212) 820-1100

Of Counsel:

JONATHAN W. MILLER
Dewey, Ballantine, Bushby,
Palmer & Wood
TODD H. NEWMAN
Nichols & Newman

BEST AVAILABLE COPY

QUESTION PRESENTED

Did the United States Court of Appeals for the Third Circuit (Hunter, Weis and Rosenn, JJ., presiding) correctly determine that certain of petitioner's claims were time-barred when they unanimously concluded that the period of limitations for a civil conspiracy under Virgin Islands law runs from each overt act causing damage?

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IN THE

Supreme Court of the United States

OCTOBER TERM 1984

No. 84-1190

PATRICK J. WELLS,

Petitioner,

—against—

DAVID ROCKEFELLER, LAURANCE ROCKEFELLER, ROCKRESORTS, INC., FOUNTAIN VALLEY CORPORATION, and ESTATE FOUNTAIN RIVER COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

Respondents David Rockefeller, Laurance Rockefeller, Rockresorts, Inc. ("Rockresorts"), Fountain Valley Corporation ("FVC") and Estate Fountain River Company ("EFRC") submit this Brief in Opposition to Patrick J. Well's Petition for a Writ of Certiorari.[1]

STATEMENT OF THE CASE

This action arises out of the parties' relationship with respect to a 64-acre parcel of property on the island of St. Croix, on

1 Neither FVC nor Rockresorts has any parent companies, subsidiaries or affiliates to be listed in accordance with Sup. Ct. R. 28.1 other than the named respondents.

which petitioner operated a nursery for trees and plants pursuant to a written lease he executed with FVC on April 1, 1968 and which expired on March 31, 1980. FVC is a corporation which owned the property that was the subject of the lease; EFRC is a partnership which owns all the stock of FVC; David and Laurance Rockefeller are the sole partners of EFRC; and Rockresorts is a corporation solely owned by Laurance Rockefeller which operated and managed FVC's property. 728 F.2d at 211; 97 F.R.D. at 43; Rec. at 45a and SA30-SA50.[2]

The history of the parties' relationship is briefly set forth in the opinion of the Court of Appeals for the Third Circuit. As explained in the accompanying letter from respondents' counsel to the Honorable Alexander L. Stevas, however, petitioner altered the copy of that opinion which he included in the appendix to his petition. Because this falsification lends facial support to otherwise unsupported statements in the petition,[3] and in order to correct other inaccuracies in the petition, respondents' statement of the case is somewhat more detailed than it otherwise would have been and includes references to the correct opinions of both the Court of Appeals and the District Court and to the record on appeal.

In 1962, David and Laurance Rockefeller formed EFRC to purchase approximately 4,085 acres of undeveloped land in and around the area of Fountain Valley on St. Croix in the U.S. Virgin Islands. Their intent was to construct and develop a first-class resort golf course on the property. Arrangements were made with an architect to produce the necessary plans and specifications for the golf course, and petitioner was awarded a

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2 References are to the published opinions of the Court of Appeals for the Third Circuit, *Wells v. Rockefeller*, 728 F.2d 209 (3d Cir. 1984), and the District Court of the Virgin Islands, *Wells v. Rockefeller*, 97 F.R.D. 42 (D.V.I. 1983), and to the record on appeal ("Rec.") to the Court of Appeals.

3 The statement of the case set forth in the petition for a writ of certiorari contains no reference whatsoever to the record in this case. Indeed, the factual assertions which are set forth on pages 3-5 of the petition are largely without support.

subcontract for the grading, grassing and landscaping work. On completion of the golf course in the mid-1960s, petitioner was paid in full for his work. 728 F.2d at 211; 97 F.R.D. at 43; Rec. at 43a.

During the years the golf course was under construction, long range plans were formulated for a large scale development on the Fountain Valley property, which included, among other proposals, subdividing the property and constructing individual homes and a hotel.[4] 728 F.2d at 211; 97 F.R.D. at 43; Rec. at 43a.

At that time, it was apparent to respondents that if the decision was made to proceed with development of the entire 4,085 acres along the lines then being considered, some provision would have to be made for acquiring suitable trees and plant material for landscaping purposes. As petitioner was already on the island and at Fountain Valley to landscape the golf course and was then importing plant material from his Florida operations, discussions were held with him concerning the feasibility of establishing an on-island nursery operation. Out of those discussions, which took place over several years, developed the idea of petitioner conducting a nursery operation at Fountain Valley. EFRC had the land and the capital, and petitioner stated that he had the expertise and existing off-island operations from which to draw. 728 F.2d at 211; Rec. at 43a-44a.

During the period 1965 to 1968, on an informal basis, EFRC provided petitioner with the use of the 64-acre parcel to plant nursery stock, and David and Laurance Rockefeller provided petitioner with loans totaling $78,000. Discussions were had about formalizing the relationship, and for tax purposes a joint venture was considered. Rec. at 44a-45a.

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4 Ultimately, however, these proposals never got beyond the planning stage and respondents never developed the Fountain Valley property, although the golf course was completed. Rec. at 43a.

Ultimately, and for a variety of reasons, primary among which was that petitioner was unable to obtain a tax abatement from the government for the nursery, the joint venture was never implemented. No written agreement purporting to create a joint venture in the 64-acre parcel was ever entered into. Instead, EFRC formed a corporation (FVC) which would own approximately 2,000 acres of the Fountain Valley property (the golf course, beach area and other commercial facilities). FVC then leased the 64-acre parcel to petitioner. Petitioner and FVC agreed upon a percentage lease for a twelve-year term in combination with repayment of the $78,000 loan. On April 1, 1968, the written 12-year lease drawn along those lines was executed. 728 F.2d at 211; 97 F.R.D.at 43; Rec. at 45a, SA30-SA50.

Soon after the lease was executed, however, petitioner's nursery operation began to deteriorate. Economic conditions began to change in St. Croix and sales fell off. The nursery stock generally was considered overpriced by those organizations which did business with petitioner and its quality became increasingly less than satisfactory. Petitioner made rental payments through April 1969—although rarely on time—and then stopped making them altogether. By mid-1972, overdue rentals amounted to approximately $40,000 and activity at the nursery had fallen to practically zero. At that point, petitioner was reminded of his obligations under the lease and was informed he was in default. As respondents had no immediate plans for the Fo ntain Valley property, no attempt was made at that time to require petitioner to pay the outstanding debt or to enforce the default provisions of the lease. In mid-1977, no rent having been paid since 1969, petitioner and FVC agreed to settle the outstanding debt by executing a written partial surrender of the lease, which released portions of the nursery property, and the trees and plant material on it, to FVC. In exchange, the overdue rentals were credited to petitioner's account and all future base rentals for the remainder of his lease were waived. 728 F.2d at 211; Rec. at 45a-46a, SA51-SA53.

In the fall of 1979 and with the lease about to expire on March 31, 1980, petitioner advised representatives of Rockresorts that he would need an extension of his lease in order to clear trees and plant material from the property and to move his business elsewhere. He made no attempt, however, in the remaining months prior to the expiration of the lease to clear any of the property. Although under the terms of the lease the trees and plants became the property of FVC when the lease expired, FVC nevertheless gave petitioner an additional 90 days after expiration of the lease to remove any nursery stock. After the extension period had passed and following fruitless attempts to get petitioner to vacate the property, FVC served petitioner with a formal "notice to quit" but, in accord with his wishes, granted him an additional six-month grace period to clear trees and plant material from the premises. 728 F.2d at 211; Rec. at 46a-47a.

By the end of the additional six-month extension, petitioner had still made no effort to clear the property. At no time during the course of the parties relationship did petitioner ever claim any interest in, or right to remain on, the property after expiration of the lease. Rec. at 46a-47a.

When it became evident that petitioner would not voluntarily quit the property, FVC turned to the district court for relief, and, on December 28, 1981, commenced an action to evict petitioner. 728 F.2d at 211; 97 F.R.D. at 43; Rec. at SA8-SA10.

Repeated attempts to serve petitioner with the complaint at a variety of locations were unsuccessful. He was clearly aware of the pendency of the action, however. On January 9, 1982, petitioner's attorney[5] wrote Laurance Rockefeller complaining of FVC's actions and stating that he had conducted "a thorough investigation and careful analysis" of the matter and was preparing a suit on petitioner's behalf. On February 18, 1982, the district court found that petitioner was a proper party who

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5 At all times during the proceedings below (both at the district court and on appeal to the Court of Appeals), petitioner was represented by counsel.

could not with due diligence be found and ordered service by substituted means. 728 F.2d at 212; 97 F.R.D. at 43; Rec. at SA4-SA5, SA11-SA12.

Pursuant to the district court's order, copies of the order and the original summons and complaint were duly published and mailed to petitioner at his Florida address on February 25, 1982. On July 19, 1982, petitioner was again served by mail, return receipt requested, at his Florida address with copies of the order and the original summons and complaint. There was no dispute that petitioner was served with the court's order, the summons and the complaint. 728 F.2d at 212; 97 F.R.D. at 43; Rec. at SA5, SA13.

On August 19, 1982, FVC moved for entry of judgment by default against petitioner. Notice of the motion was sent to and received by petitioner. After another month had passed without an appearance or any response by petitioner, on September 29, 1982, the district court entered a judgment of default against petitioner and ordered restitution of the property to FVC. *See Fountain Valley Corp. v. Wells*, 98 F.R.D. 679 (D.V.I. 1983). 728 F.2d at 212; 97 F.R.D. at 43.

At no time during the pendency of FVC's action did petitioner respond, appear or in any way attempt to raise any of the claims he later attempted to assert against respondents in this action. An examination of the complaint petitioner subsequently filed in this action reveals why: recognizing that the time for asserting all of his claims had long ago run, he attempted to use the default judgment in *Fountain Valley Corp. v. Wells* as a basis for a non-time-barred claim of wrongful eviction, which, when coupled with the conspiracy claim he was also asserting, would allow him to argue that the statute of limitations did not bar any of his other claims. 728 F.2d at 212-213; 97 F.R.D. at 43.

PROCEEDINGS BELOW

After petitioner received notice of FVC's motion for entry of a default judgment in *Fountain Valley Corp. v. Wells*, he commenced a separate action—this action—against respondents. He alleged that respondents had defrauded him in 1968 when they deprived him of a joint venture interest in the nursery by coercing him into signing a lease and claimed that respondents' actions in seeking to have the district court eject him from the property gave rise to a claim for wrongful eviction.

Respondents moved for summary judgment and dismissal in *Wells v. Rockefeller* on the grounds that petitioner's claims were compulsory counterclaims in *Fountain Valley Corp. v. Wells* and were thus barred under Rule 13(a) of the Federal Rules of Civil Procedure and the doctrine of *res judicata*. On March 2, 1983, the district court (O'Brien J., presiding) granted FVC's motion, without prejudice to petitioner's right to reopen the default judgment.[6] *Wells v. Rockefeller*, 97 F.R.D. 42 (D.V.I. 1983).

Petitioner then moved to set aside the default in *Fountain Valley Corp. v. Wells* and to interpose counterclaims identical to those asserted in *Wells v. Rockefeller*. On July 22, 1983, the district court denied petitioner's motion to set aside the default, finding that the default was willful and culpable, and

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6 The summons had stated incorrectly that petitioner had three rather than 30 days to respond. Because of that circumstance, the district court's dismissal below was entered without prejudice to an application by petitioner to reopen the default—so petitioner would have the opportunity to have the court determine whether the mistake in the summons caused him to default (97 F.R.D. at 46). In ruling on petitioner's subsequent motion to set aside the prior default judgment, the district court found that the mistake in the summons was not related to petitioner's default, but rather that petitioner had intentionally and willfully chosen to default to further his own claims. 98 F.R.D. at 686-8.

that the proffered defenses and counterclaims were without merit. In making this latter finding, Judge O'Brien found that petitioner's affirmative claims were barred by the statute of limitations and by the statute of frauds, and that his execution in 1977 of the partial surrender was a waiver of his claim that the lease was invalid. *Fountain Valley Corp. v. Wells*, 98 F.R.D. 679 (D.V.I.1983).

Petitioner appealed both decisions to the Court of Appeals for the Third Circuit which, *sua sponte*, consolidated them for disposition. 728 F.2d at 211.

The Court of Appeals affirmed the district court's refusal to open the default judgment, specifically concurring with the district court's finding that the default was a calculated litigation tactic of petitioner and his counsel. 728 F.2d at 214. The Court of Appeals did not, however, find it necessary to review the district court's holding that the default judgment had precluded petitioner's claims, since it held that substantially all of those claims were time-barred. 728 F.2d at 215. The Court of Appeals also did not consider the district court's findings that the statute of frauds precluded proof of the alleged oral joint venture agreement and that petitioner had ratified the lease in 1977 by his execution of the partial surrender. *See Fountain Valley Corp. v. Wells*, 98 F.R.D. at 683, 684 n.13.

REASONS FOR DENYING THE WRIT

This petition for a writ of certiorari is frivolous; it involves nothing more than a question of local law of the Virgin Islands—specifically, the appropriate construction to be given to a Virgin Islands statute of limitations where a civil conspiracy is alleged. As the opinion of the Court of Appeals makes clear, that court was only "determining the controlling rule of decision for the Virgin Islands." 728 F.2d at 217. Contrary to petitioner's suggestion, there is no "split of authority" on the application of the Virgin Islands statute of limitations and, therefore, no reason for this Court to exercise its power of review.

The issue below was one of first impression in the Virgin Islands—the construction of 5 V.I. Code § 31(5)(A) (the two-year statute of limitations for torts) where a civil conspiracy is alleged. The question addressed was whether the courts of the Virgin Islands should apply the limitations period from each overt act causing damage or from the last overt act alleged. As the Court of Appeals noted, the issue had not been addressed by statute, any provision of the Restatement or any court of the Virgin Islands.

Under the law of the Virgin Islands, the method for determining the appropriate rule of decision in such a case is provided for by statute. Section 4 of Title 1 of the Virgin Islands Code, upon which the Court of Appeals relied, provides:

> The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

In holding that the limitations period in the Virgin Islands for a civil conspiracy commences with each overt act causing damage, the Court of Appeals was merely determining the local common law rule of decision in the courts of the Virgin Islands. Its ruling does not conflict with the decision of any other circuit or any federal or territorial court. Indeed, it is the only decision which has ever construed 5 V.I. Code § 31(5)(A) in the context of a civil conspiracy allegation. The mere fact that other courts have determined other jurisdictions to have different local rules,[7] presents no "special or important reasons" that should lead this Court to exercise its discretion and undertake to review the unanimous decision of the court below

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7 *See, e.g., White v. Bloom*, 621 F.2d 276, 281 (8th Cir.), *cert. denied*, 449 U.S. 995 (1980) (Missouri law); *Slavin v. Curry*, 574 F.2d 1256, 1261 (5th Cir. 1978) (Texas law).

concerning a local law of the Virgin Islands. *See* Sup. Ct. R. 17.

The decision below involved no error on the part of the Court of Appeals in the resolution of any federal policy or state law question; nor did it depart from the accepted usual course of judicial proceedings. *See* Sup. Ct. Rule 17. In declining to adopt a rule for the Virgin Islands which would in essence allow a civil litigant to assert a 14-year old fraud claim, the Court of Appeals properly recognized a rule which provides greater certainty as to when a particular claim arises. As the Court of Appeals correctly pointed out, the rule urged by petitioner would breed litigation by inviting an artful pleader to resurrect time-barred claims simply by alleging they were part of an on-going conspiracy. The potential for abuse and the impact on the already crowded dockets of the federal courts are obvious.

Nor did the Court of Appeals make any mistake in construing the Virgin Islands statute of limitations. Its conclusion was not only consistent with the rule generally adopted in the Third Circuit,[8] but also by this Court in construing federal statutes of limitations. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1972) ("In the context of a continuing conspiracy to violate the antitrust laws, . . . each time a plaintiff is injured by the act of the defendants a cause of action accrues to him to recover the damages caused by that

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8 *See Ammlung v. City of Chester*, 494 F.2d 811, 814-15 (3d Cir. 1974) (Pennsylvania law); *Williamson v. Columbia Gas and Electric Corp.*, 186 F.2d 464, 469 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951); *Phoenix Canada Oil Co. v. Texaco, Inc.*, 560 F. Supp. 1372, 1388-89 (D. Del. 1983) (Delaware law); *Safeguard Mutual Insurance Co. v. Miller*, 477 F. Supp. 299, 308 (E.D. Pa. 1979); *Park-In Theatres, Inc. v. Paramount-Richards Theatres, Inc.*, 90 F. Supp. 727, 729 (D. Del.) (Delaware law), *aff'd* 185 F.2d 407 (3d Cir. 1950), *cert. denied*, 341 U.S. 950 (1951); *Auld v. Mobay Chemical Co.*, 300 F. Supp. 138, 142 (W.D. Pa. 1969); *Dovberg v. Dow Chemical Co.*, 195 F. Supp. 337, 342-43 (E.D. Pa. 1961).

act and that, as to those damages, the statute of limitations arises from the commission of the act.")[9]

Moreover, the result below is amply justified on grounds not reached by the Court of Appeals. The district court correctly held that petitioner's claims were barred by the statute of frauds and could only have been proved by inadmissible parol evidence, and that his execution of a partial surrender of the lease in 1977 ratified his 1968 action. 98 F.R.D. at 654. Likewise, the district court was correct that its eviction order in *Fountain Valley Corp. v. Wells* was in no sense "wrongful" or an overt act in any "conspiracy"; it was intentionally procured by petitioner and caused him no damage cognizable at law. 728 F.2d at 214. The district court also correctly held that petitioner's claims that he was entitled to enforce a purported oral joint venture agreement and set aside a lease entered into in 1968 were barred by Rule 13(a) of the Federal Rules of Civil Procedure and principles of *res judicata* because those claims should have been interposed in FVC's action for eviction. 97 F.R.D. at 44.

Finally, as set forth in the accompanying letter of respondents' counsel to the Honorable Alexander L. Stevas, the writ should be denied because of petitioner's attempted fraud on this Court by altering the opinions below, Sup. Ct. R. 22.5; *Furness, Withy & Co. v. Yang Tsze Ins. Assn.*, 242 U.S. 430, 434 (1917). Petitioner's conduct is contemptuous and an obstruction of justice. At a minimum, damages (including all costs and attorneys' fees) should be awarded to respondents, Sup. Ct. R. 49.2, and this Court should direct that the remaining count of petitioner's complaint be dismissed.

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9 Similarly, the decision of the court below is in accord with the rule in other circuits in construing federal statutes of limitations. *See, e.g., Compton v. Ide*, 732 F.2d 1429, 1432-33 (9th Cir. 1984); *Lawrence v. Acree*, 665 F.2d 1319, 1324 (D.C. Cir. 1981); *Hernandez Jiminez v. Calero Toledo*, 576 F.2d 402, 404 (1st Cir. 1978); *Rutkin v. Reinfeld*, 229 F.2d 248, 252 (2d Cir.), *cert. denied*, 352 U.S. 844 (1956); *Crummer Co. v. DuPont*, 223 F.2d 238, 247 (5th Cir.), *cert. denied*, 350 U.S. 848 (1955).

CONCLUSION

For the reasons set forth above, respondents respectfully request this Court to deny the petition for writ of certiorari and impose appropriate sanctions on petitioner.

April 11, 1985

Respectfully submitted,

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CERTIFICATE OF SERVICE

I am a member of the Bar of the Supreme Court of the United States and certify that on April 11, 1985, pursuant to Rule 28.3 of the Rules of this Court, three copies of this Brief in Opposition were mailed, first-class postage prepaid, to Patrick J. Wells, 102 Riverview Gardens, 1000 S.E. 4th Street, Ft. Lauderdale, Florida 33301. I further certify that all parties required to be served have been served.

/s/JONATHAN W. MILLER

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FILED
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No. 84-1190

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

PATRICK J. WELLS,

Petitioner,

—against—

DAVID ROCKEFELLER, LAURANCE ROCKEFELLER, ROCK-RESORTS, INC., FOUNTAIN VALLEY CORPORATION, and ESTATE FOUNTAIN RIVER COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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QUESTION PRESENTED

There is not a Virgin Islands statute or provision of a restatement directly addressing the issue raised by Wells.

There is a split of authority on when the limitations period for civil conspiracy commences.

Some courts apply the rule used in criminal cases, that is, the limitations period begins on the commission of the last overt act of the conspiracy.

Other jurisdictions, including those of the third circuit have applied the rule that the period runs from each overt act causing damage.

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IN THE

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

Petitioner Patrick J. Wells submits this Reply Brief to Respondents David Rockefeller, Laurance Rockefeller, Rockresorts Inc. ("Rockresorts"), Fountain Valley Corporation (FVC) and Estate Fountain River Company ("EFRC") in reply to their Brief in Opposition to Patrick J. Wells, Petitioner for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

There is not a Virgin Islands statute or provision of restatement directly addressing the issue raised by Petitioner.

There is a split of authority on when the limitations period for a civil conspiracy commences.

Some courts apply the rule used in criminal cases, that is, the limitations period begins on the commission of the last overt act of conspiracy.

Other jurisdictions, including those of the third circuit have applied the rule that the period runs from each overt act causing damage. 728 F.2d at 217.

Under the law of the Virgin Islands, the method for determining the appropriate rule of decision in such a case as this is provided for by statute. Section 4 of Title 1 of the Virgin Islands Code, upon which the Third Circuit Court of Appeals relied provides this:

> The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally

> understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

In holding that the limitations period in the Virgin Islands for a civil conspiracy commences with each overt act causing damage, the Third Circuit Court of Appeals is determining the local common law rule of decision in the courts of the Virgin Islands.

How can this be when the rules of the common law approved by the American Law Institute says, as generally understood and applied in the United States.

The Third Circuit Court in their determining of the Local Common Law have applied the rule that they used in their section - Part of the United States. This doesn't seem right or fair, if the United States Courts in some other areas can apply the other version of the rule, couldn't the whole country have the same rule. Sup. Ct. R. 17(a).

"Special and important reasons" are present in this issue; most ordinary citizens have a reliance on the law for the best possible equality of fairness and protection, this is of great signifi-

cance to the ordinary person who mostly does act with proper caution and is alert to the risks of a changing and complex business world. But skillful, sometimes trusted, people conspiring against them cannot always be detected and defended against and to catch them and expose them, to try and untangle things most times cannot be done in a couple of short years and as all this unfolds, things surface. The case of the Petitioner might be an overall example with long periods of time, lots of people, and several companies involved even non-recording of a deed.

Potentially, this could help in reducing on-going conspiracies; participants would act with the knowledge they did not have a short term time shield to hide behind.

Ordinary people would have a good aid and a strong deterrent to combat the elusive and the talented conspirators.

Finally, as set forth in the letter of Petitioner to the Honorable Alexander L. Stevas on April 26, 1985, the writ should be granted because in respondents' Brief in Opposition of April 11, 1985 at "Statements of the Case," much of this is very similar to the Affidavit on November 18, 1982, which I discuss in my letter at Pages 5 and 6. On Pages 3-4-5 of this Brief in Opposition, there appear to be in error 14 untrue and false things and

four inaccurate and misleading things. Respondents continue to try steamrolling me. They criticize me in their April 11 letter and ask for penalties against me. Because I was telling what I knew as the truth and they are not telling the truth, the law being the same for all of us, I ask that I be considered for the same type of requests they asked for against me.

With all due respect to all the courts and attorneys involved.

Respondents' continuing conduct is surprising and vindictive. Respondents have been untruthful and contemptible and are trying to obstruct justice.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests this Court to grant the petition for writ of certiorari and impose appropriate sanctions on Respondents.

May 4, 1985

Respectfully submitted,

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